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No. 88-462

In The

Supreme Court of the United States

October Term, 1988

United Paperworkers International Union,
AFL-CIO, Local No. 1069,

Petitioner,

v.

S.D. Warren Company, A Division of
Scott Paper Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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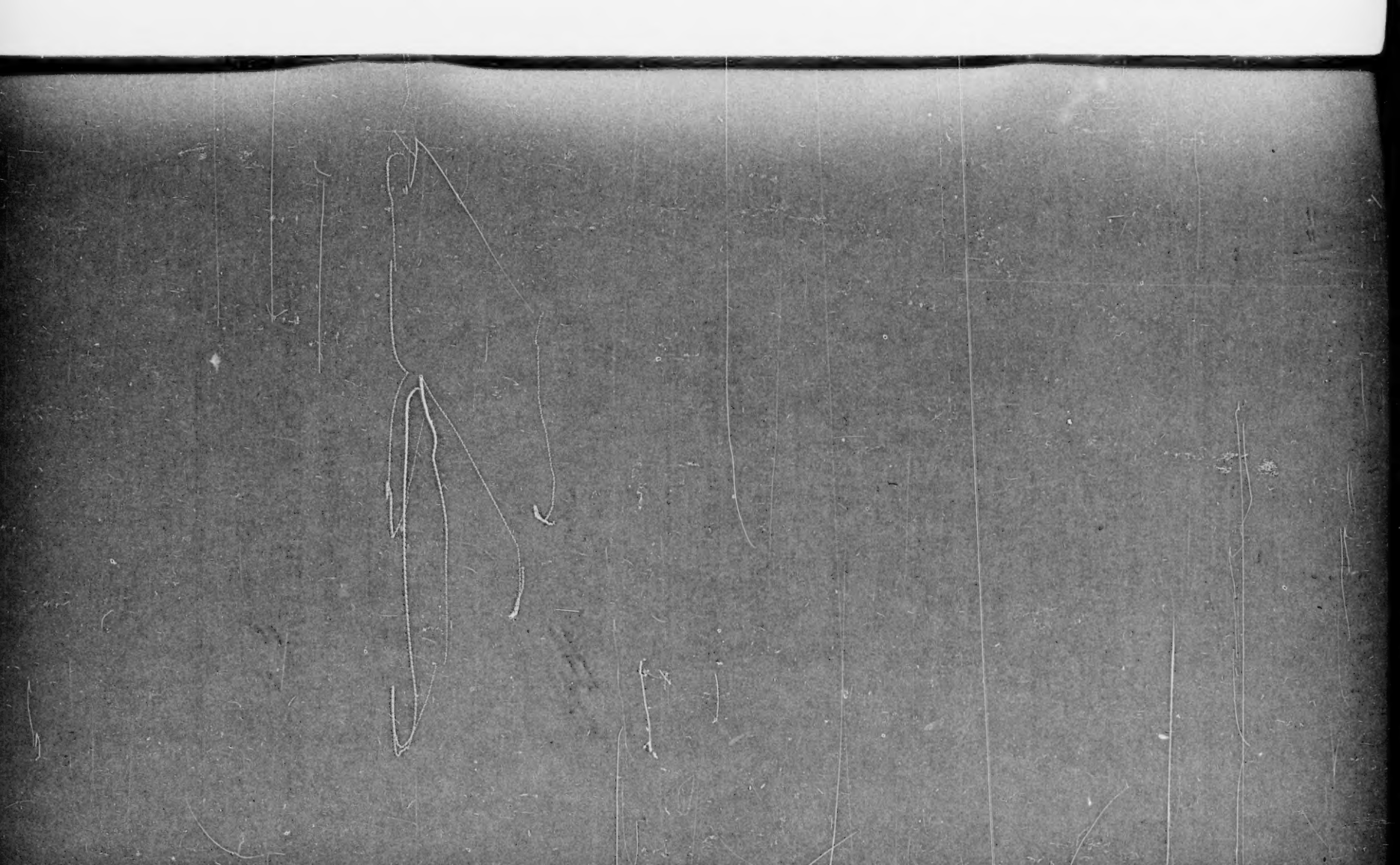

QUESTION PRESENTED

Whether the scope of arbitral authority is unrestricted by the express language of a collective bargaining agreement reserving to management the "sole right . . . to discharge employees for proper cause," and providing that violation of a workplace drug and alcohol rule is "cause for discharge," where an arbitrator finds that employees subject to discipline in fact violated the workplace drug and alcohol rule?

RULE 28.1 LISTING

Scott Paper Company has the following subsidiaries and affiliates (except wholly-owned subsidiaries): Scott Iberica, S.A.; Taiwan Scott Paper Corporation; Cellulosa Jujuy, S.A.; Compania Industrial de San Cristobal, S.A.; COPA-Companhia de Papeis; Sanyo Scott Company Limited; Scott Paper Company de Costa Rica, S.A.; Scott Paper Limited: Scott Trading Limited; Ssangyong Paper Company, Limited; Thai-Scott Paper Company; Cabin Bluff Management Company (partnership); Canso Chemicals Limited; Mountain Tree Farm Company.

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BRIEF IN OPPOSITION

JURISDICTION

Respondent's request of September 28, 1988, for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari was granted by the Clerk of this Court, and time was extended up to and including November 18, 1988. Resp. App. A, p. 1a.

STATEMENT OF THE CASE

Petitioner United Paperworkers International Union, Local 1069, representing employees at S.D. Warren's Cumberland Mills, negotiated and entered into a collective bargaining agreement with Respondent S.D. Warren Company. The bargaining agreement reserves to the Company "the sole right to . . . discharge employees for proper cause." In Mill Rule 7(a), the bargaining agreement in turn provides that possession, use or sale of illegal drugs or intoxicants is "considered cause for discharge." Pet. App. F, p. 109a. *See also* Pet. App. H, pp. 133a-135a.

After an undercover investigation, twelve employees at the Company's Cumberland Mills were discharged for violation of the workplace drug and alcohol rule, eleven for dealing in illegal drugs, and one for possessing alcohol on Company property. The Union presented grievances on behalf of ten of the twelve, dividing the discharged employees into two groups of five.*

Arbitrator Suzanne Gwiazda found that the four discharged employees in the first group had violated the workplace drug and alcohol rule. Pet. App. E, pp. 94a-107a. She also found that, under the collective bargaining agreement, the Company "chose to retain discretion over . . . decisions" regarding discipline of employees who had violated the rule. Pet. App. E, p. 77a. Arbitrator Gwiazda concluded, however, that when the Company bargained for the sole right to decide discipline for violations of the workplace drug and alcohol

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*The Union voluntarily withdrew the grievance for one of the individuals in the first group.

rule, "it allowed a third party neutral the same discretion when reviewing the propriety of those decisions." *Id.*

To determine her award, Arbitrator Gwiazda weighed various "mitigating circumstances."* The Arbitrator's independent evaluation told her that although the grievants' "drug activity in the workplace must be viewed as very serious misconduct," Pet. App. E, p. 93a, the better decision was for the Company to suspend, not discharge. *See* Pet. App. E, pp. 97a, 99a, 103a, 107a.

Rejecting the recommendation of its magistrate, the United States District Court for the District of Maine upheld Arbitrator Gwiazda's award reinstating the discharged employees. Pet. App. D, pp. 39a-40a. In *S.D. Warren* I, the United States Court of Appeals for the First Circuit reversed, holding that the parties had not bargained for arbitral review of the disciplinary decision, but instead had restricted the scope of the Arbitrator's authority by creating in the Company an exclusive right to decide discipline for violations of the workplace drug and alcohol rule. Pet. App. C, pp. 26a-27a. The First Circuit also said that the Arbitrator's award violated a dominant and well-defined public policy against drugs in the workplace. Pet. App. C, p. 30a.

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*For example, in determining the "fair" penalty for one employee, the Arbitrator assessed her seniority, work record, working conditions, initial resistence to the undercover agent, and her possession of marijuana for use after work. Pet. App. E, pp. 102a-103a. "[B]alancing the seriousness of drug possession in the mill against the many mitigating factors," Arbitrator Gwiazda "conclude[d] that the fair penalty is a four-month suspension." Pet. App. E, p. 103a.

The Union petitioned this Court for a writ of certiorari. While the petition was pending, this Court decided *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987). In light of *Misco*, the Union's petition was granted, the First Circuit judgment was vacated, and the case was remanded to the court of appeals for further consideration under *Misco*. Pet. App. B, p. 12a.

In *S.D. Warren* II, the First Circuit assumed, without deciding, that *Misco* foreclosed the public policy grounds upon which the court had earlier relied. Following rebriefing and argument, the First Circuit reaffirmed its ruling that Arbitrator Gwiazda had "exceeded her contractual authority in overturning the employees' discharges." Pet. App. A, p. 8a. After a lengthy and detailed discussion of the facts and holding in *Misco*, the court of appeals distinguished *S.D. Warren*. Pet. App. A, pp. 2a-11a. First, in *S.D. Warren* there was no attempt to set aside or undermine an arbitrator's findings. Pet. App. A, p. 9a. The First Circuit explained that the Arbitrator below found " 'beyond a reasonable doubt' " that the discharged employees violated the workplace drug and alcohol rule. Pet. App. A, p. 9a. In this respect, *S.D. Warren* was unlike *Misco*, where "the arbitrator found that the Company failed to prove that the employee had possessed or used marijuana on company property." *Misco*, 108 S. Ct. at 368-69. Second, the First Circuit recognized that in *S.D. Warren*, unlike *Misco*, the parties had negotiated, incorporated into the collective bargaining agreement, and put before the arbitrator a specification of

disciplinary rules and resulting penalties which left nothing to the arbitrator except to determine whether a violation occurred. Pet. App. A, p. 10a. The court of appeals concluded that *S.D. Warren* came under the exception envisioned in *Misco* when this Court explained that "[t]he parties, of course, may limit the discretion of the arbitrator . . . and it may be [that] it was within the unreviewable discretion of management to discharge an employee once a violation of [the] Rule was found." *Misco*, 108 S. Ct. at 372. This exception applied in *S.D. Warren* and not in *Misco*, because in *S.D. Warren* the Arbitrator found that the employees violated the disciplinary rule, and the collective bargaining agreement reserved to management exclusive authority over discipline of employees who violated the disciplinary rule. Pet. App. A, pp. 10a-11a.

Meanwhile, the second group of grievants came before Arbitrator Theodore Role, who entered his award after the district court upheld the Gwiazda reinstatements, but before the court of appeals reversed in *S.D. Warren* I. Arbitrator Role observed that under the collective bargaining agreement "the Company's right to discharge in the instant case is limited to – 'for proper cause.' " Pet. App. H, p. 185a. Next, the Arbitrator observed that the "proper cause" necessary to the Company's right to discharge was synonymous with the "cause" for discharge resulting from an employee's violation of the workplace drug and alcohol rule. *Id.* Finally, the Arbitrator observed that the Company "clearly obtained sufficient evidence that the Grievants were guilty of Section 7(a) violations." Pet. App. H, p. 192a. But, in the face of these observations, Arbitrator Role added a seven-part test which allowed him to reject

discharge in favor of suspension.* Pet. App. H, pp. 186a-198a.

After Arbitrator Role entered his award, the First Circuit decided *S.D. Warren* I and then, on remand in light of *Misco*, reaffirmed its earlier decision to vacate the Gwiazda reinstatements in *S.D. Warren* II. The United States District Court for the District of Maine followed the First Circuit's decision in *S.D. Warren* II, and vacated the Role reinstatements. Pet. App. G, pp. 124a-126a. The Union appealed, and in *S.D. Warren* III, the First Circuit affirmed.

For the third time, yet another panel of the court of appeals explained that the language of the particular collective bargaining agreement before it restricted the scope of arbitral authority by reserving to the Company the exclusive discretion to discharge for violation of the workplace drug and alcohol rule. Given that the Arbitrator found that the discharged employees violated the workplace drug and alcohol rule, and given "the difficulty one has imagining how one could use the English language to state more clearly that the Company retains

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*For example, one of the factors in Arbitrator Role's seven-part test was whether the "degree of discipline [was] reasonably related to [the] seriousness of the offense and the employee's record." Pet. App. H, p. 186a. The Arbitrator concluded that discharge of the employees for violating the workplace drug and alcohol rule was too severe. This conclusion was based upon an elaborate charting of the relative penalties for violations of various rules other than the workplace drug and alcohol rule, which revealed that the longest suspension for such other types of violations was six months and the average suspension was 9.7 days. Pet. App. H, pp. 194a-197a.

the prerogative to decide whether or not to discharge one who violates Mill Rule 7," the First Circuit again concluded that *Misco* was distinguishable, and that the court must vacate "an arbitrator's interpretation of a contract outside the authority delegated to him by the contract." Pet. App. F, p. 111a.

REASONS FOR DENYING WRIT

In 1987, this Court decided the case of *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987). Following on the heels of *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), *Misco* gives new emphasis to principles this Court announced twenty-five years ago in the *Steelworkers Trilogy*. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).[1]

Petitioner concedes that *Misco* speaks directly to the question of a federal court's authority to review arbitral

[1] In the words of one commentator, *Misco* "breathed new life" into precepts of the *Steelworkers Trilogy*. Note, *The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards – How Far Should Expansion Go?*, 39 S.C.L. Rev. 465, 489 (1988). The relative paucity of scholarly commentary regarding the impact of *Misco* is doubtless due to the fact that insufficient time has elapsed for commentators to react in print.

interpretations of collective bargaining agreements.[2] Indeed, Petitioner forcefully argues that "[a]ny doubt as to the meaning of the *Trilogy* with respect to the scope of judicial authority to enforce a court's understanding of the 'express language' of a collective bargaining agreement should have been laid to rest . . . by this Court's decision in *Misco*." Brief for Petitioner at 20. Respondent agrees.

The issue, therefore, is not whether any of the circuit courts, prior to *AT&T* and *Misco*, differed in their application of *Steelworkers* principles.[3] Rather, the issue is whether, after *AT&T* and *Misco*, any split has developed which justifies a third restatement of the relevant law in as many years. For three reasons, this Court should refrain from yet another foray into the area.

A. Such an effort would be premature. Review of Petitioner's Table of Authorities underscores the prematurity of certiorari. Only one circuit case is cited which was decided after *Misco*, and it lacks a published opinion.

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[2] Although a writ of certiorari was granted in *Misco* "on the question of when courts may set aside arbitration awards as contravening public policy," the parties argued, and this Court decided, the issue of whether the court of appeals had exceeded its authority to review the arbitrator's award. *Misco*, 108 S. Ct. at 369-73.

[3] Respondent here reaffirms its pre-*Misco* argument to this Court that Petitioner imagines a conflict which is not acknowledged by any court of appeals. Respondent appends its Brief in Opposition on Petition for Writ of Certiorari, *United Paperworkers' Int'l Union v. S.D. Warren Co.*, No. 87-583 (Nov. 10, 1987). *See* Resp. App. B, pp. 2a-20a.

United Inter-Mountain Tel. Co. v. Communications Workers, 845 F.2d 327 (6th Cir. 1988), *aff'g* 662 F. Supp. 82 (E.D. Tenn. 1987), *petition for cert. filed*, (No. 87-5701) (Sept. 18, 1988). Since Petitioner claims that both *United Inter-Mountain* and *S.D. Warren* are wrongly decided, *see* Brief for Petitioner at 23 n.13, on the basis of Petitioner's own brief, it would appear that no post-*Misco* split exists.

Petitioner fails to identify a post-*Misco* split for the simple reason that none exists. Six circuits have yet to decide, in light of *Misco*, whether an arbitral award draws its essence from a collective bargaining agreement.[4] The remaining seven circuits have followed *Misco*, and all have upheld arbitral awards out of deference to the possibility that the arbitrator was construing or applying the

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[4] There are no opinions citing *Misco* by the Fifth, Seventh and District of Columbia Circuits. The only Third Circuit opinion citing *Misco* upheld an arbitral award under *Misco's* public policy strand. *See United States Postal Serv. v. National Ass'n of Letter Carriers*, 839 F.2d 146, 149-50 (3d Cir. 1988). The only Tenth Circuit opinion citing *Misco* upheld an arbitral award where there was no collective bargaining agreement. *See Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 635 (10th Cir. 1988). The Federal Circuit has cited *Misco* only once, and then only to explain that in *Misco* this Court did not address whether deference was due arbitration awards not the subject of appeal. *See Horner v. Schuck*, 843 F.2d 1368, 1377-78 (Fed. Cir. 1988).

collective bargaining agreement.[5] Only the First, Second and Eleventh Circuits have cited *Misco* in published opinions vacating an arbitral award for failure to draw its essence from a collective bargaining agreement.[6] The Second Circuit was confronted with an arbitral award which

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[5] *See Berklee College of Music v. Berklee Chapter of the Mass. Fed'n of Teachers*, No. 88-1073, slip op. at 8 (1st Cir. Sept. 27, 1988); *Bayamon Can Co. v. Congreso de Uniones Industriales*, 843 F.2d 65 (1st Cir. 1988); *Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2d Cir. 1988); *Holcomb v. Colony Bay Coal Co.*, 852 F.2d 792 (4th Cir. 1988); *Borman's, Inc. v. United Food Workers Int'l Union, Local 876*, Nos. 87-1909, 87-1948 (6th Cir. Oct. 7, 1988)(LEXIS, Genfed library, USApp file) (not recommended for publication); *General Foods Corp. v. United Cereal Workers*, No. 87-1649 (6th Cir. June 1, 1988) (LEXIS, Genfed library, USApp file) (not recommended for publication); *Daniel Constr. Co. v. Local 257, Int'l Bhd. of Elec. Workers*, 856 F.2d 1174 (8th Cir. 1988); *United Paperworkers Int'l Union v. Georgia-Pacific Corp.*, 841 F.2d 243 (8th Cir. 1988); *Pullman Power Prod. Corp. v. Local 403, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*, 856 F.2d 1211 (9th Cir. 1988) (opinion on rehearing); *Florida Power Corp. v. International Bhd. of Elec. Workers*, 847 F.2d 680 (11th Cir. 1988).

[6] In an opinion not citing *Misco*, filed only eighteen days after this Court decided *Misco*, not recommended for publication and not reported, the Sixth Circuit vacated an arbitral award because the arbitrator had exceeded the scope of his authority under the collective bargaining agreement. *Highlands Hosp. Corp. v. District 1199 WV/KY/OH Nat'l Union of Hosp. Employees*, No. 86-6227 (6th Cir. Dec. 18, 1987) (LEXIS, Genfed library, USApp file). Despite the collective bargaining agreement's express reservation to the hospital of the sole right to discipline an employee once just cause was found, after determining that there was just cause for discipline, the arbitrator in *Highlands Hospital* independently evaluated the hospital's

(Continued on following page)

did not purport to rely upon any express or implied contract term, or upon bargaining history, industrial custom or past practice, and, indeed, which did not contain even an explanation of the arbitrator's reasoning. *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 95-96 (2d Cir. 1988). The Eleventh Circuit vacated an arbitral award

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(Continued from previous page)

choice of remedy. *Id.* Although the *Highlands Hospital* majority did not cite *Misco*, neither the majority opinion nor subsequent Sixth Circuit decisions depart from *Misco*. In two more recent decisions, the Sixth Circuit has cited *Misco*, deferred to the arbitrator, and enforced the arbitral award. *See Borman's, Inc. v. United Food Workers Int'l Union, Local 876*, Nos. 87-1909, 87-1948 (6th Cir. Oct. 7, 1988) (LEXIS, Genfed library, USApp file) (not recommended for publication); *General Foods Corp. v. United Cereal Workers*, No. 87-1649 (6th Cir. June 1, 1988) (LEXIS, Genfed library, USApp file) (not recommended for publication). *Cf. United Elec. Workers v. G & C Foundry Co.*, No. 87-3232 (6th Cir. Jan. 26, 1988) (LEXIS, Genfed library, USApp file) (not recommended for publication) (enforcing arbitrator's precondition for reinstatement by requiring satisfactory certification of fitness to return to work).

Under its local Rule 24, the Sixth Circuit may control publication and limit citation of its opinions. The rationale for the limited-publication rules in the Sixth and other circuits is to reduce the unnecessary proliferation of published opinions serving no jurisprudential purpose. *See* 6th Cir. R. 24(a)(1); *Furman v. United States*, 720 F.2d 263, 265 & n.1 (2d Cir. 1983). Respondent is uncertain whether it is proper even to cite to Sixth Circuit opinions not recommended for publication and available only by computerized research service, but feels obligated to disclose possibly relevant authority of which it has become aware. It seems obvious, however, that decisions regarded by the Sixth Circuit as lacking sufficient jurisprudential import for publication cannot appropriately serve as a basis for certiorari.

which created and imposed a new policy in direct conflict with an express provision of the collective bargaining agreement specifically reserving exclusive authority over the policy to the employer. *Bruno's, Inc. v. United Food Workers Int'l Union, Local 1657*, No. 87-7743 (11th Cir. Oct. 31, 1988) (LEXIS, Genfed library, USApp file).[7]

The First Circuit has applied *Misco* three times: once in *Bayamon Can Co. v. Congreso de Uniones Industriales*, 843 F.2d 65 (1st Cir. 1988), once in these two *S.D. Warren* actions, and once in *Berklee College of Music v. Berklee Chapter of the Mass. Fed'n of Teachers*, No. 88-1073, slip op. (1st Cir. Sept. 27, 1988).[8] Less than three weeks before deciding *S.D. Warren* III, the First Circuit reversed the United States District Court for the District of Puerto Rico and, citing *Misco*, upheld an arbitrator's award because it was arguably within the language of the collective bargaining agreement. *Bayamon Can*, 843 F.2d at 66-67. More recently, in *Berklee College of Music*, the First Circuit enforced another arbitral award because of the limited

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[7] *Cf. United States Postal Serv. v. National Ass'n of Letter Carriers*, 847 F.2d 775, 777-79 (11th Cir. 1988) (citing *Misco* for its public policy holding, but vacating an arbitral award on the alternative grounds that reinstatement of a postal employee convicted of mail theft was arbitrary and capricious because of the arbitrator's erroneous application of due process principles).

[8] In the only other First Circuit opinion citing *Misco*, the court of appeals noted that "pursuant to national . . . labor policies, arbitration awards enjoy a higher degree of deference than court judgments." *Estrada-Izquierdo v. Aponte-Roque*, 850 F.2d 10, 19 n.9 (1st Cir. 1988).

scope of judicial review under *Misco*. Far from acknowledging any supposed split, the First Circuit has explained what distinguishes *S.D. Warren* in *Berklee College of Music:*

> In *S.D. Warren,* the contract said that management had the 'sole right' to dismiss a person who violated Mill Rule 7, and the arbitrator found that the employees had violated Mill Rule 7. We could not think of a way to express more clearly than through the use of the words 'sole right' the fact that it was up to management, not the arbitrator, to decide whether or not to dismiss the employee.

Berklee College of Music, No. 88-1073, slip op. at 7-8. Indeed, Petitioner and *Berklee College of Music* use nearly identical language to interpret *Misco,* the First Circuit observing that *Misco* "has reiterated, in language stronger than previously used, that matters of contract interpretation are typically up to the arbitrator, not the courts." *Id.* at 3.

Since Petitioner fails to show any "deep division" among the circuits after *Misco,* in essence, Petitioner asks this Court to grant certiorari because the two post-*Misco* decisions it cites are claimed to be wrongly decided. *See* Brief for Petitioner at 23 n.13.

B. Certiorari should be denied for the simple reason that *S.D. Warren* is correct. *S.D. Warren* follows *Misco, AT&T,* and the *Steelworkers* principles these decisions

have so recently reemphasized.[9] Nothing in *S.D. Warren* suggests that the First Circuit disagrees with *Misco*. On the contrary, the First Circuit abandoned its public policy rationale in light of *Misco*, and carefully distinguished the facts in *S.D. Warren* from those which were before this Court. In *S.D. Warren*, unlike *Misco*, the arbitrators found that the discharged employees had violated the workplace drug and alcohol rule. Moreover, in *S.D. Warren*, unlike *Misco*, the parties had negotiated, incorporated into the collective bargaining agreement, and put before the arbitrators a specification of disciplinary rules and resulting penalties which left nothing to the arbitrators

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[9] *Misco* explicitly acknowledges that under *AT&T*, 475 U.S. at 649-50, it is for the courts to enforce limitations on the scope of arbitral authority for which the parties have bargained. In *Misco*, this Court observed that judicial deference is due an arbitral award "as long as the arbitrator is even arguably construing or applying the contract *and acting within the scope of his authority.*" *Misco*, 108 S. Ct. at 371 (emphasis added). Under *AT&T* and *Misco*, courts are not authorized to reconsider the merits of an arbitral award, and arbitrators are not authorized to usurp the "unreviewable discretion of management" reserved under a collective bargaining agreement. *Id.* at 372. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-78 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). Hence, Petitioner errs in assuming federal courts owe any particular deference to the arbitrators' determinations that it was within the scope of their authority to review S.D. Warren's decision to discharge its employees once the arbitrators found that the employees had violated the workplace drug and alcohol rule. *See AT&T*, 475 U.S. at 651 (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964) (quoting *Atkinson v. St. Clair Refining Co.*, 370 U.S. 238, 241 (1962)).

except to determine whether a violation occurred. As the First Circuit explained, *S.D. Warren* came under the exception envisioned in *Misco* when this Court observed that it might be "within the unreviewable discretion of management to discharge an employee once a violation of [the] Rule was found." *Misco*, 108 S. Ct. at 372.

C. Even assuming, *arguendo*, there is some post-*Misco* division among the circuits sufficient to justify certiorari, or that *S.D. Warren* marked a significant departure from *Misco*, this Court should deny certiorari in *S.D. Warren* because the question presented by Petitioner cannot be decided on this record. The arbitrators below did not interpret a provision in the collective bargaining agreement by reference to a past practice under that provision. The record is inadequate to establish any past practice regarding discipline for violation of the workplace drug and alcohol rule, and the question of appropriate discipline under the rule appears to have been one of first impression.[10]

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[10] In a somewhat confusing discussion, Arbitrator Gwiazda mentions two "apparent" violations of the workplace drug and alcohol rule, but recognizes that these were also simultaneous violations of last chance agreements under S.D. Warren's Employee Assistance Program. Regarding violations of the workplace rule by possession of illegal drugs, the Arbitrator observed that "no penalty had ever been imposed before – leaving the whole matter a big question mark." Pet. App. E, p. 84a.

Arbitrator Role recognized that the grievants before him were the first ever to be disciplined for violations of the workplace drug and alcohol rule. *See* Pet. App. H, pp. 188a, 194a.

CONCLUSION

Petitioner and Respondent agree that "[a]ny doubt as to the meaning of the *Trilogy* with respect to the scope of judicial authority to enforce a court's understanding of the 'express language' of a collective bargaining agreement should have been laid to rest . . . by this Court's decision in *Misco*." Brief for Petitioner at 20. No circuit court has questioned the accuracy of this proposition. No circuit court has suggested that it perceives any split among *any* of the circuits. Indeed, six circuits have had no opportunity even to apply the relevant *Steelworkers* principles reemphasized in *Misco*.

For these reasons, review of these decisions would not represent a timely or efficient use of this Court's discretionary power of review. The petition for a writ of certiorari should be denied.

DATED: November 16, 1988

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

September 29, 1988

S. Mason Pratt, Jr., Esquire
Pierce, Atwood, Scribner, Allen,
Smith & Lancaster
One Monument Square
Portland, ME 04101

Re: *United Paperworkers' International Union, AFL-CIO, Local No. 1069 v. S.D. Warren Company, etc., No. 88-462*

Dear Mr. Pratt:

Your request of September 28, 1988, for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including November 18, 1988.

Very truly yours,

JOSEPH F. SPANIOL, JR.,
Clerk

By

/s/
Francis J. Lorson
Chief Deputy Clerk

kb
cc: Mark Brooks, Esq.

APPENDIX B

No. 87-583

In The

Supreme Court of the United States

October Term, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,

Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. MASON PRATT, JR.
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November 10, 1987

QUESTION PRESENTED

Does a federal court have the power to vacate an arbitral award which disregards unambiguous collective bargaining agreement language and substitutes therefor the arbitrator's own brand of industrial justice?

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RULE

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No. 87-583

In The

Supreme Court of the United States

October Term, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,

Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,[1]

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[1] In satisfaction of the requirements of United States Supreme Court Rule 28.1, Scott Paper Company has the following subsidiaries and affiliates (except wholly-owned subsidiaries): Scott Iberica, S.A.; Taiwan Scott Paper Corporation; Cellulosa Jujuy, S.A.; Compania Industrial de San Cristobal, S.A.; COPA-Companhia de Papeis; Sanyo Scott Company Limited; Scott Paper Company de Costa Rica, S.A.; Scott Paper

(Continued on following page)

STATEMENT OF THE CASE

This case hinges upon the construction of a certain collective bargaining agreement between the parties governing the production employees at Respondent's (hereinafter sometimes referred to as the "Company") paper mill in Westbrook, Maine. After three mill employees were discharged for violation of a specific contract rule, Rule 7(A), prohibiting possession, use or sale of illegal drugs on the mill premises, Petitioner (hereinafter sometimes referred to as the "Union") filed grievances on behalf of the discharged employees. The grievances ultimately were submitted to arbitration.[2]

The bargaining agreement provides that the Company has "the sole right to . . . discharge . . . for proper cause." Petitioner's Appendix (hereinafter "App.") 43a. It further provides that violation of Rule 7(A) "is considered cause for discharge." The arbitrator found that the

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(Continued from previous page)

Limited; Scott Trading Limited; Ssangyong Paper Co., Ltd.; Thai-Scott Paper Company; Brunswick Pulp Land Company, (partnership); Canso Chemicals Limited; Mountain Tree Farm Company.

[2] In fact, twelve employees were simultaneously discharged for violation of Rule 7(A). The grievances involved herein, together with the grievance of Marshall Buhelt, were consolidated with a fifth grievance filed on behalf of Roland Villacci and assigned to Arbitrator Suzanne Gwiazda. Prior to hearing, the Union voluntarily dismissed the Villacci grievance. Arbitrator Gwiazda upheld the discharge of Mr. Buhelt. Five other grievances were consolidated and assigned to Arbitrator Theodore Role, whose award is the subject of another related and pending proceeding. The Union never filed grievances on behalf of the remaining two discharged employees.

three grievants, in fact, violated Rule 7(A) and acknowledged that such violations were dischargeable offenses. She nevertheless ordered the employees reinstated because she found Rule 7(A) ambiguous in that its heading, "Causes for Discharge," contains no verb and in that it fails to state that violations unequivocally "will be" cause for discharge. App. 66a-67a. The arbitrator also observed that, under the contract, the Company "chose to retain discretion over such decisions" regarding discipline for violation of Rule 7(A). App. 67a.

The arbitrator then reasoned that the Company's retention of discretion over discipline somehow "allowed a third party neutral [i.e., the arbitrator] the same discretion when reviewing the propriety of those [disciplinary] decisions." App. 67a. *See also* App. 87a. In other words, because the Company made certain at the bargaining table to retain for itself the "sole right" to decide to discharge for proper cause, it also subjected such discretionary decisions to arbitral review.

The arbitrator, therefore, reviewed *de novo* the "fairness" of the Rule 7(A) discharge decisions by weighing various "mitigating circumstances."[3] Despite her finding that there was no past practice with respect to possession,

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[3] For example, in determining the "fair" penalty for Linda Willoughby, the arbitrator specifically took into account her seniority, work record, difficult working conditions, initial resistance to the undercover agent and possession of marijuana for post-work enjoyment. App. 92a. "Balancing the seriousness of drug possession against the many mitigating factors in Ms. Willoughby's case," the arbitrator "conclude[d] that the fair penalty is a four-month suspension." App. 93a.

use or sale of drugs on mill premises, App. 74a, she also examined the relative severity of discipline imposed for other unrelated employee misconduct. *See, e.g.*, App. 68a-69a. She found that although the grievants' "drug activity in the workplace must be viewed as very serious misconduct," App. 84a, "as a matter of equity," discharge was an excessively harsh punishment for such misconduct. *See* App. 84a, 87a, 89a, 92a.

The United States District Court for the District of Maine confirmed the arbitrator's award reinstating the discharged employees. The United States Court of Appeals for the First Circuit reversed the district court decision, holding that the arbitrator exceeded her authority by substituting her extra-contractual view of fairness and equity for the Company's collectively bargained right to discharge employees who use, possess or sell drugs at work. App. 14a-15a. The First Circuit also held that the arbitrator's award violated the dominant and well-defined public policy against drugs in the workplace. App. 18a.

The question for this Court is whether this case involving the construction of the parties' contract presents an issue with respect to which there is a direct and important conflict of the circuit courts of appeals which requires Supreme Court resolution, presents such an important constitutional or statutory question as to warrant review or, for any other reason, demands this Court's attention.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT AMONG CIRCUITS.

The First Circuit decision is in accord with, and expressly relied on, decisions in the Sixth and Tenth Circuits. *See Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board,* 724 F.2d 1217 (6th Cir. 1984); *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.,* 630 F.2d 474 (6th Cir. 1980); *Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977). The First Circuit also relied on the Fourth Circuit decision in *Textile Workers Union, Local 1386 v. American Thread Co.,* 291 F.2d 894 (4th Cir. 1961). App. 13a-14a.

Petitioner maintains, however, that the decisions of the Third, Fifth, Seventh and Eighth Circuits stand "in stark contrast" to, and are in direct conflict with, the decisions of the First, Sixth, Tenth and, presumably, Fourth Circuits. This simply is not the case. *Not one* of the Third, Fifth, Seventh and Eighth Circuit decisions cited by Petitioner contains any statement rejecting or even mildly criticizing, the Sixth and Tenth Circuit decisions with which they allegedly conflict; nor do they acknowledge the existence of the conflict suggested by the Union.

Indeed, the Third Circuit, far from rejecting the Sixth and Tenth Circuits' decisions, has expressly approved them. In *Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers, Local 112,* 687 F.2d 673 (3d Cir. 1982), *cert. denied,* 460 U.S. 1011 (1983) (upholding award reinstating employee discharged for insubordination on ground that arbitrator found that discharged employee

was not, in fact, insubordinate), the Third Circuit distinguished and expressly approved the Sixth Circuit's decision in *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.*, 630 F.2d 474:

> *Nestle*, however, merely stands for the proposition – *with which we fully agree* – that an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement, but, in disregard of those facts and the terms of the agreement, refuses to uphold the discharge.

687 F.2d at 680 (emphasis supplied). The court also specifically cited with approval the Tenth Circuit's decision in *Int'l Union of Operating Eng'rs, Local 670 v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980) (following *Mistletoe*, court vacated award wherein arbitrator ignored provisions in agreement making the giving of false statements to obtain sick leave grounds for discharge). *Id.; see also H. K. Porter Co. v. United Saw, File & Steel Products Workers*, 333 F.2d 596, 602 (3d Cir. 1964) ("[a]rbitrator was unjustified in deviating from the plain mandate" of contract).

Thus, the Third Circuit's approach to the question presented herein clearly does not conflict with the Sixth or Tenth Circuits' decisions relied on by the First Circuit below. And yet the Third Circuit is one of the circuits upon which Petitioner principally relies to illustrate the existence of a conflict worthy of this Court's attention.

The Fifth, Seventh and Eighth Circuits also agree with the premise underlying the First Circuit's decision,

namely, that an arbitrator may interpret ambiguous language but may not disregard or modify plain and unambiguous contract language. App. 18a. For example, the Seventh Circuit has cited approvingly the Sixth Circuit decision in *Morgan Services*, 724 F.2d 1217, 1222-24, for the proposition that "the arbitrator may not modify the contract unless authorized to do so." *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 186 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986); *see also Young Radiator Co. v. Int'l Union, U.A.W.*, 734 F.2d 321, 325 (7th Cir. 1984) (where contract gave employer right to discharge for theft, arbitrator's decision that discharge was proper only if theft was "motivating cause" for discharge did not draw its essence from contract); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1421 (8th Cir. 1986), *reh. denied*, 817 F.2d 1333 (8th Cir. 1987) (*citing with approval* Tenth Circuit decision in *Kerr-McGee* and Sixth Circuit decision in *Detroit Coil Co. v. I.A.M.*, 594 F.2d 575 (1979)); *St. Louis Theatrical Co. v. St. Louis Theatrical Bhd., Local 6*, 715 F.2d 405, 409 (8th Cir. 1983) (arbitrator exceeded authority by balancing equities of company's discipline where "agreement [was] not susceptible to a construction beyond its plain meaning"); *Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562, 566 (8th Cir. 1964) (where clear intendment of contract was that, in event of discharge, arbitrator would not substitute his judgment for that of employer, arbitrator exceeded authority by reducing penalty after finding employee guilty of acts charged); *Teamsters, Local 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 905 (5th Cir. 1984) ("arbitrator may not disregard or modify plain and unambiguous provisions of the agreement") (*citing with approval Storer*

Broadcasting Co. v. Am. Fed'n of Television & Radio Artists, 600 F.2d 45, 47 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099 (1981)).

In short, there is no conflict among the circuit courts of appeals on the fundamental point that an arbitrator may not refuse to uphold, on fairness grounds, the discharge of an employee once the arbitrator finds facts clearly constituting grounds for discharge under the bargaining agreement. Because the First Circuit did no more than apply this elemental principle, the petition should be denied.

B. THIS CASE RAISES NO IMPORTANT QUESTION OF FEDERAL LAW.

The First Circuit's holding that the arbitrator exceeded her authority by entering the domain of the propriety of the penalty raises no important question of federal law. Rather, the court merely followed the doctrines of the *Steelworkers Trilogy* and applied them to the particular facts at hand.

The First Circuit premised its decision on the well-established principle that, although arbitrators are to be given great latitude in interpreting collective bargaining agreements, judicial deference to arbitral awards is not absolute. *See AT & T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, ___, 106 S. Ct. 1415, 1418 (1986) (whether bargaining agreement creates duty to arbitrate a particular question is "undeniably an issue for judicial determination"). Specifically, arbitrators may not dispense their own brand of industrial justice but are confined to the interpretation and application of the parties' bargaining agreement; "all arbitration awards must draw

their essence from the collective bargaining agreement." App. 5a, *citing United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). By ignoring such provisions and substituting her own view of the appropriate penalty for that of the Company, the arbitrator exceeded her authority, and her award failed to draw its essence from the bargaining agreement.

It is clear, under the *Steelworkers Trilogy*, that an award does not "draw its essence from" a contract when such an award abandons the contract in favor of the arbitrator's own agenda for industrial justice. *Enterprise Wheel & Car*, 363 U.S. at 597. Far from undermining the *Steelworkers Trilogy*, the First Circuit decision simply applies its teachings. Thus, neither this case nor any other First Circuit decision[4] threatens or even questions the important principles set forth in the *Steelworkers Trilogy*. On the contrary, applying an extremely deferential standard of review to arbitral awards, it has consistently enforced the awards of arbitrators who have confined

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[4] *See, e.g., Posadas de Puerto Rico Assoc., Inc. v. Asociacion de Empleados de Casino de Puerto Rico*, 821 F.2d 60, 61 (1st Cir. 1987) (lamenting the "exasperating frequency" with which meritless challenges to arbitral awards are brought, court awarded double costs to appellee); *Bechtel Constr., Inc. v. Laborers' Int'l Union*, 812 F.2d 750 (1st Cir. 1987); *Intl Bhd. of Firemen & Oilers, Local 261 v. Great Northern Paper Co.*, 765 F.2d 295 (1st Cir. 1985); *Trustees of Boston Univ. v. Boston Univ. Chapter, Am. Ass'n of Univ. Professors*, 746 F.2d 924 (1st Cir. 1984).

themselves to the interpretation and application of the bargaining agreement.[5]

Of course, different cases applying the *Steelworkers Trilogy* necessarily produce varying results both among the circuits and within each circuit. These differences, however, are caused, not by any fundamental disagreement as to the standard of judicial review of arbitral awards, but by factual differences, such as differences in the particular contracts involved and in arbitral factual findings as to whether the employee engaged in the misconduct alleged. *Compare, e.g., Fabricut, Inc. v. Tulsa General Drivers, Warehousemen & Helpers, Local 523*, 597 F.2d 227 (10th Cir. 1979) *and Industrial Mutual Ass'n v. Amalgamated Workers, Local 383*, 725 F.2d 406 (6th Cir. 1984) *with Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977) *and Local 342, U.A.W. v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969).

Thus, the question in any given case is whether a court was correct in concluding, based on the facts before it, that the award did or did not draw its essence from the contract. That each case necessarily turns on the specific

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[5] Furthermore, Petitioner is inaccurate in its attempt to show the Court that there is a growing trend at the federal appellate level to overturn or vacate arbitral awards. Contrary to footnote 10 on page 19 of the Petition for Writ of Certiorari, among labor arbitration cases decided by the circuit courts of appeals, there has been, in fact, a significant *decline* in the percentage of arbitral awards being overturned: our reading of the confusing source relied on by Petitioner reflected a 37.8% vacate rate from 1971-1975 but only a 26.1% vacate rate from 1981-1985.

agreement and factual findings involved would explain why this Court has routinely declined to review such cases, regardless of whether the arbitral award, in the particular case, was confirmed or vacated.[6]

This case, too, turns on the specific agreement negotiated by the local unit of production workers and the Company, as well as on the arbitrator's findings that the grievants were guilty of the acts alleged and that, *under the contract*, the Company reserved the discretion to discharge for such acts. Under the terms of that agreement, the parties removed from arbitral consideration the question of the appropriate or just penalty for possessing, selling or using marijuana on mill property. The arbitrator's conclusion that she was free to assess the equities of

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[6] *See, e.g., Teamsters, Local 863 v. Jersey Coast Egg Producers*, 773 F.2d 530 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1468 (1986); *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986); *Manhattan Coffee Co. v. Int'l Bhd. of Teamsters, Local 688*, 743 F.2d 621 (8th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *Super Tire Eng. Co. v. Teamsters Local 676*, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); *Sears, Roebuck & Co. v. Teamsters, Local 243*, 683 F.2d 154 (6th Cir. 1982), *cert. denied* 460 U.S. 1023 (1983); *Arco Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3d Cir.), *cert. denied*, 459 U.S. 828 (1982); *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981); *Storer Broadcasting Co. v. Am. Fed'n of Television & Radio Artists*, 600 F.2d 45 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099 (1981); *Detroit Coil Co. v. Int'l Ass'n of Mach. & Aerosp. Workers*, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union*, 548 F.2d 1288 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977); *Local 342, U.A.W. v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 345 U.S. 910 (1969).

the discharge decisions simply was not based on, and did not draw its essence from, the contract.

In sum, the decision below presents no issues demanding the attention of this Court. This case involves no important constitutional issue or undecided statutory issue. Instead, the case reflects the First Circuit's application of the long-standing teaching that a federal court must refuse enforcement of an award by an arbitrator who does not "confine [herself] to interpretation and application of the collective bargaining agreement." *Enterprise Wheel & Car,* 363 U.S. 593, 597 (1960).

C. THE PENDING *MISCO* CASE IS NOT A REASON TO GRANT CERTIORARI IN THIS CASE.

As Petitioner notes, one reason the First Circuit reversed the district court decision was that the arbitrator's award violated the public policy against drugs in the workplace. This Court has this term granted certiorari and heard oral argument in a case involving nearly identical facts and issues of public policy. *Misco, Inc. v. United Paperworkers Int'l Union,* 768 F.2d 739 (5th Cir. 1985), *cert. granted,* 107 S. Ct. 871 (1986) (No. 86-651). The pendency of the *Misco* decision suggests, if anything, the propriety of this Court postponing a decision to grant certiorari on the public policy question until it renders a decision in the *Misco* case.

If this Court affirms the Fifth Circuit decision, there will be no need for the Court to review the instant case because one of the gounds on which the circuit decision rests shall already have been sustained by the Court. Moreover, even if this Court reverses the Fifth Circuit's

Misco decision, there is no reason to review this case because, as demonstrated above, the other ground upon which the First Circuit reversed the district court decision presents no important question of federal law or conflict with the other circuit courts of appeals, but rather, merely reflects proper application of a universally accepted principle of labor law to a specific labor agreement.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit be denied.

DATED: November 10, 1987

Respectfully submitted,

S. MASON PRATT, JR.
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